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No. 99-___

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In The

# Supreme Court of the United States

OLUFEMI LUKAN,

*Petitioner,*

v.

GLORIA SCOTT, Superintendent of North Forest Independent School District, and L.V. BRISCO, Deputy Superintendent of North Forest Independent School District,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED*

1. Should lower courts decide disputed facts regarding an official's motive when assessing a qualified immunity defense in motive-based constitutional torts?

2. Can it ever be "objectively reasonable" to deliberately retaliate against a public employee when the retaliation violates clearly established law?

3. Does the seventh amendment limit the ability of the lower courts to make factual determinations as to motive and causation on an interlocutory appeal of the denial of qualified immunity?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Olufemi Lukan respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 28, 1999.

## OPINION BELOW

The July 28, 1999, opinion of the court of appeals, which is reported at 183 F.3d 342 (5th Cir. 1999), is set out at App. 1-9 of the Appendix. The opinion of the court of appeals denying petitioner's petition for rehearing, which is not reported, is set out at App. 10-11 of the Appendix.

## JURISDICTION

The decision of the court of appeals denying petitioner's petition for rehearing was entered on September 26, 1999. This Petition for Writ of Certiorari is filed within 90 days of the entry of that order. This Court has jurisdiction to hear this matter under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Seventh Amendment states in pertinent part, "In suits at common law . . . the right of trial by jury shall be preserved. . . . "

Section 1 of the Fourteenth Amendment states in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

## STATEMENT OF THE CASE

## SUMMARY OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

There is a radical conflict between the circuits as to how to assess the evidence of an official's motive when determining his or her entitlement to qualified immunity in a motive-based constitutional tort case. Some, like the Fifth Circuit, find it within their jurisdiction on interlocutory appeal to weigh the evidence and make factual determinations. The Tenth and Eleventh Circuits have reached similar results. The First, Second, and Sixth Circuits, on the other hand, hold that they lack jurisdiction on interlocutory appeal to decide such questions of fact. The conflict is caused in large part, Petitioner submits, because of the complexity of the doctrine of qualified immunity and its application to different kinds of constitutional violations.

The decision by the court below violates the strict limitations placed on an appellate court's jurisdiction under the collateral order doctrine. That doctrine allows the appeal of otherwise nonfinal determinations, such as entitlement to qualified immunity, only when the issue to be resolved is completely separate from the merits of the

case. By weighing the evidence and making factual determinations as to motive and causation, the court below stepped outside this strict limitation and wrongly asserted jurisdiction over the disputed facts.

The judicially-created doctrine of qualified immunity, despite its laudable purpose, should not be allowed to supplant the Seventh Amendment's guarantee of trial by jury. This Court has long observed that factual disputes are to be resolved by juries, not judges. The Fifth Circuit's opinion violates this fundamental principle.

## PROCEDURAL HISTORY

In the summer of 1997, Petitioner Olufemi Lukan applied for, and was denied, two new jobs created by his employer, the North Forest Independent School District. One was a position as the Chief Financial Officer and the other was for the position of Internal Auditor. In September 1997, Petitioner commenced this action in the 334th District Court of Harris County, Texas, against the school district and two individual defendants, Superintendent Gloria Scott and Deputy Superintendent L.V. Brisco. The petition alleged that Petitioner was denied each of these positions because he had reported serious financial improprieties within the school district's operations to the Texas Education Agency and the Harris County District Attorney's Office, and those denials violated the First Amendment to the United States Constitution, as well as the Texas Whistleblower Act.

The defendants filed an answer and then removed the lawsuit to the U.S. District Court for the Southern

District of Texas. The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1441(b), 1446(a). Following a limited amount of discovery, Respondents filed a motion for summary judgment on the basis of qualified immunity and all defendants sought summary judgment on the merits. While Petitioner filed a motion under Fed.R.Civ.P. 56(f) because additional discovery was necessary and had been blocked by the defendants, he also filed a response to the motion for summary judgment out of an abundance of caution.

The district court denied Respondents' motion for summary judgment as to all matters on December 11, 1998. On January 26, 1999, the district court denied as moot Petitioner's Rule 56(f) motion. On interlocutory appeal, the Fifth Circuit directed dismissal of the claims against Respondents on qualified immunity grounds.

## FACTS

This case results from Petitioner's reports of serious financial improprieties at North Forest Independent School District, which is located in the Houston metropolitan area. Petitioner learned of these improprieties in 1997, within months after he replaced Respondent Brisco as the Director of Financial Services for the school district. Lukan reported these financial irregularities to the Texas Education Agency ("TEA") and to the Harris County District Attorney's Office. (Original Petition at 2-3).

From 1980 through June 1996, Respondent Brisco was responsible for the district's Business Office. (Lukan Aff.

at ¶ 2, Brisco Aff. at ¶ 2). Petitioner, a certified public accountant, was Brisco's subordinate for three years. He then served as Internal Auditor for the next seven years – from 1989 through July 1996. (Lukan Aff. at ¶¶ 7, 29). During that time, Lukan was responsible for conducting reviews of operations and procedures, keeping the Superintendent informed of the district's financial affairs, performing internal audits, and assisting the external auditors. (Thomas Aff. at ¶¶ 3, 8, 12). Lukan, however, had no direct authority over activities he reviewed and was not responsible for the day-to-day staff functions such as making general ledger entries or reconciling the bank accounts. (Internal Audit Charter).

The external auditors regularly voiced criticisms of the operations of Brisco's department. (Yates Aff. at ¶ 11, Lukan Aff. at ¶ 20, Thomas Aff. at ¶ 9). The most repeated criticism was the department's failure to properly reconcile the bank accounts. Year after year, the external auditors, along with Lukan, spent days and days tracing and correcting the errors. (Lukan Aff. at ¶¶ 14-20). Then-Superintendent Thomas, who supervised both Brisco and Lukan, explained that the history of problems in the district's financial records was Brisco's responsibility:

> Every year, the audit would show things that were wrong in the accounting department and there would be finger pointing. Mr. Brisco and Tony Lukan blamed each other for those problems, and there is now no doubt in my mind as to who was at fault. It was the accounting department, not Tony Lukan, who was responsible for the problems with the district's finances

> and those in the Business Office. Mr. Lukan had no responsibility for the bank reconciliations at that time. He was not supposed to be doing that staff function, Mr. Brisco and his staff were supposed to be getting those done.

(Thomas Aff. at ¶ 11). The problems in Brisco's department worsened in the last few years of Thomas' service as Superintendent. One former Board member recalls the development of the problems:

> [O]ver the last three years or so of Dr. Thomas' service to us, Mr. Brisco became less and less cooperative with both Dr. Thomas and Mr. Lukan. Mr. Brisco frequently blocked Mr. Lukan's efforts to obtain information from the Business Office. Mr. Lukan told us Board members on many occasions that he was frustrated about not getting cooperation from Mr. Brisco.

(Yates Aff. at ¶ 7). After giving Brisco the benefit of the doubt for several years, Thomas ultimately reached the conclusion that Brisco was not competent to handle these responsibilities. (Thomas Aff. at ¶ 11).

When Thomas left the district in March 1996, the Board promoted Respondent Scott to Superintendent. (Scott Aff. at ¶ 2). She, in turn, promoted Brisco to Deputy Superintendent and elevated Lukan to Director of Financial Services. (Brisco Aff. at ¶ 2, Scott Aff. at ¶ 3). It was during Lukan's first few months in this position that he discovered several unexplained financial irregularities, which he reported to TEA. (Lukan Aff. at ¶¶ 32, 34).

One of the matters investigated as a result of Petitioner's reports dealt with the wire transfer of $2.1 million of the school district's monies to a third party, T.R. Associates. (Lukan Aff. at ¶ 39). While Respondents asserted that these payments were legitimate expenses for "runoff" health insurance claims[1] and the cost of processing those claims, Lukan was unable to obtain satisfactory documentation to support such large expenditures of the district's monies. (Lukan Aff. at ¶ 39, 40). The various wire transfers that totaled $2.1 million were all approved and ordered by Respondents, and the vast majority of the money was transferred before Petitioner became Director of Financial Services. (Documents No. 00591-608).

Other matters of concern that Petitioner reported to the law enforcement agencies were: (1) Brisco and Scott had circumvented both the competitive bidding laws and the directive of the Board of Trustees on a construction project; (2) Brisco took two of the district's brand new laptop computers home, and directed his staff to not record their purchase by the district; and (3) there was a questionable financial entry in the general ledger showing over $7.3 million attributed to miscellaneous expenses. (Lukan Aff. at ¶¶ 32-35). Over the course of the next school year, TEA investigated these and other financial irregularities and the district attorney's office also began its own investigation. (Canby Depo. at 45). The school district's external auditors were involved in trying

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[1] Runoff insurance claims are those that accrue in one fiscal year but are not paid until the following year. (Scott Aff. at ¶ 4).

to uncover what became of the $2.1 million sent by wire transfer to T.R. Associates. (Lukan Aff. at ¶¶ 39-47).

After a prolonged battle, the district's auditors gained limited access to T.R. Associates' records, (Lukan Aff. at ¶ 47), but were unable to confirm that the monies were either spent appropriately or properly accounted for. (Davis & Graves Preliminary Report, Documents No. LUK00114-152). They did, however, identify several irregularities: (1) T.R. Associates invoiced (and received payment from) the district for the total medical charges on the providers' invoices, instead of the lesser amount actually paid to the providers; (2) it invoiced (and received payment from) the district for the amounts on voided checks; and (3) there were significant differences between the cancelled checks and those reported in the company's claim register. (*Id.*).

Meanwhile, TEA, with the assistance of Lukan and the district attorney's office, performed an analysis of how T.R. Associates withdrew monies from, and re-deposited monies to, its own bank accounts. (Canby Depo. at 42-61; Lukan Aff. at ¶ 47; Document Nos. LUK00153-154). This analysis did not support T.R. Associates' allegation that individual health care providers were being paid from the account into which the district's funds had been sent. Instead, it shows what could reasonably be considered as evidence of money laundering. (Yates Aff. at ¶ 34). Because the district attorney's office did not have the personnel to pursue the paper trail of money with the necessary fine-tooth comb, the Federal Bureau of Investigation took over the matter. It has yet to conclude its investigation. (Canby Depo. at 46, 66-67, 72-73).

The tension on the School Board – and between the Board and Respondents – increased dramatically over the course of the next few months. Members of the Board began asking probing questions of Respondents – and began expressing frustration, displeasure, and, ultimately, outrage at Respondents for their responses, or lack thereof, to those questions. (Yates Aff. at ¶¶ 18-19, Coleman Aff. at ¶¶ 21-22; Documents No. 002681-2682, 002925-26, 002930). In March 1997, a majority of Board members concluded that they could no longer trust Respondents and voted to suspend both of them. (Documents No. 002930, 002943). A few weeks later, on April 15, 1997, they voted to terminate Scott. (Coleman Aff. at ¶¶ 21-23; Documents No. 003014, 003018). Only a few weeks later, however, a hotly contested race for seats on the Board of Trustees led to a change in the balance of power and the then-majority voted to allow Scott and Brisco to return to work. (Yates Aff. at ¶ 27, Coleman Aff. at ¶¶ 23-24).

Upon her return to the district, Scott directed that all financial matters be handled by Respondent Brisco and the two consultants who were then helping the district get caught up on bank reconciliations and other problems. (Lukan Aff. at ¶ 65). No reason for this decision was given. Shortly thereafter, Scott made the decision to place a "Chief Financial Officer" over the financial affairs of the district, essentially replacing the position held by Lukan as the Director of Financial Services. To accomplish her goals, Scott formed an ad hoc "screening committee," hand-selected its members, and reserved the position of committee chair to herself. That committee then interviewed various candidates, including Lukan.

As Scott later reported to the Board, both she and her committee recommended someone other than Lukan to fill this "new" position. The Board accepted her recommendation. As one Board member explained,

> the majority of the Board voted to do whatever Dr. Scott wanted about the Chief Financial Officer. She had just returned from being put on leave as a result of our earlier decision to terminate her services – and the balance of power on the Board had changed such that four of the Board members now supported her.
>
> We all knew that Dr. Scott did not like Mr. Lukan. We knew that Dr. Scott had so much resentment of Mr. Lukan that she just would never work with him. And I know that she did not like him because he reported problems to the TEA – problems to do with the wire transfer of over $2 million to T.R. Associates, the laptops that Mr. Brisco had taken home for which he did not repay the district (until the TEA made him) for having caused their loss, and how she had handled the ROTC building and the expansion program at the Administrative Building.

(Yates Aff. at ¶ 27). Lukan was then demoted to Fixed Assets Accountant, a title later changed to "Director".

Next, Scott decided that the district should again have an Internal Auditor, a position she had left vacant when Lukan was promoted the previous summer. The same committee was used to fill this position and Scott and the committee again recommended someone other than Lukan for the position, even though that individual

was not a certified public accountant. Scott's recommendation was adopted by the Board on this matter as well. As a now-former Board member explained:

> Based on all my discussions with other members of the Board, my discussions with Dr. Scott, and my knowledge of the history of how things operated within the District, I believe that Mr. Lukan's reporting of financial irregularities (which could have also been violations of the law) to the TEA influenced the Board's vote to deny him the positions of Chief Financial Officer and Internal Auditor. I believe this because Dr. Scott clearly resented him for having made that report and the Board did not exercise independent judgment when the decisions were made to fill those two positions.

(Yates Aff. at ¶¶ 28, 29).

Ironically, despite his more than 15 years of responsibility for the district's financial affairs, Brisco became Deputy Superintendent for the district. Lukan, who reported questionable transactions involving millions of dollars of district funds, on the other hand, was demoted and his office moved to a remote location a quarter of a mile away from the books and records he uses for his job. (Lukan Aff. at ¶ 71).

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. There is a Conflict in the Circuits on How to Assess Factual Disputes as to an Official's Intent When the Question of Qualified Immunity is Raised on Interlocutory Appeal

There is a radical conflict between the courts of appeals as to how they should regard factual disputes as to an official's intent in motive-based constitutional tort cases when the trial court denies qualified immunity and an interlocutory appeal is taken. This conflict preceded, and has followed, this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). While *Crawford-El* was not itself a decision as to whether the official in question was entitled to qualified immunity, it established two things. First, in an interlocutory appeal of the denial of qualified immunity, it did not prohibit the lower courts from addressing questions of subjective intent when that is an essential element of the plaintiff's case. Second, despite the laudable purpose behind the qualified immunity doctrine, the courts may not require "clear and convincing" evidence of an unlawful motive in response to a qualified immunity defense. The courts of appeals have diverged in their interpretation of this holding.

The Fifth Circuit, in the instant case, takes the view that it has jurisdiction on interlocutory appeal to weigh the evidence and make its own determination as to whether the plaintiff has sufficient proof of (a) the actor's subjective intent and (b) whether that intent caused the adverse action. Along similar lines, the Eleventh Circuit takes the position that it has jurisdiction on interlocutory appeal to (a) weigh the evidence, (b) make a factual

determination that there were mixed motives for the challenged action (one lawful and the other not), and (c) decide that, because one was lawful, the official was entitled to qualified immunity. *Brown v. Cochran*, 171 F.3d 1329, 1333 (11th Cir. 1999).

In its own unique perspective on qualified immunity, the Tenth Circuit found that it had jurisdiction to weigh the evidence as to unlawful motivation. It then determined that the plaintiff did not prove that his speech was a motivating factor in his termination, and, due to that failure, he had not met "the first prong of the qualified immunity standard." *Butler v. City of Prairie Village*, 172 F.3d 736, 746 (10th Cir. 1999).

In direct contrast to *Lukan*, the Sixth Circuit held in *Hoard v. Sizemore*, 1999 U.S. App. LEXIS 29961 (6th Cir. November 17, 1999) that, even though the official argued that his decision to terminate the plaintiffs was objectively reasonable given the dire financial circumstances of the county, a factual question remained as to whether he was motivated "by budgetary concerns or by the political affiliation of the plaintiffs" *Id.* at *9. Finding this question outside its jurisdiction, the court refused to entertain it. *Id.* The Second Circuit similarly held in *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999) that, even if the evidence regarding causation was "one-sided," the appellate court cannot decide matters of "evidence sufficiency" on an interlocutory appeal. Likewise, the First Circuit held in *Guilloty-Perez v. Fuentes-Agostini*, 1999 U.S. App. LEXIS 30549 (1st Cir., November 19, 1999) that it lacked jurisdiction to hear an interlocutory appeal on the denial of qualified immunity because the resolution depended upon an assessment of the actions and motives of the

defendants and whether they would have taken the same actions irrespective of the plaintiff's speech.

This conflict in the circuits requires resolution. Persons suffering retaliation for engaging in conduct clearly protected by the Constitution are finding that the outcome of their efforts to seek redress depends, not so much on what the facts of their situations are, but more so on the part of the country in which the redress is sought.

This conflict also demonstrates the need to reconcile the various opinions by this Court that have dealt with the question of qualified immunity. The complexity of the doctrine is, in large part, responsible for this confusion. Qualified immunity is a judicially-created defense and its contours and application have changed over the years. A brief look at the critical decisions is necessary.

The shaping of the current dilemma began with this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There, the Court ruled that, when a constitutional violation is alleged against a governmental official, that individual is entitled to qualified immunity if the law was not "clearly established" at the time. The question is whether "a reasonable person" would have known that the conduct at issue violated a clearly established right, 457 U.S. at 817-818, and is often referred to as "the objective reasonableness test." The test should be applied, the Court stated, not only to preclude liability, but also to protect government officials from the rigors and expenses of trial.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that, in order to implement *Harlow*'s decision that an individual entitled to qualified immunity should be able to avoid trial, an official is allowed to seek immediate review of a district court's denial of qualified immunity by way of an interlocutory appeal. The collateral order doctrine could be used as a vehicle for appeal, the Court held, so long as the matter to be resolved would: (1) conclusively determine a disputed question, (2) resolve an important issue completely separate from the merits of the case, and (3) be effectively unreviewable on appeal from a final judgment.

Next, in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court ruled that, if the determination of whether an official is entitled to qualified immunity depends on an assessment of facts (there, the personal involvement of three police officers in the plaintiff's beating), an appellate court would not have jurisdiction on interlocutory appeal. The appellate court's determination, it explained, would require that it review the sufficiency of the evidence, which it may not do on an interlocutory appeal. 515 U.S. at 313.

*Crawford-El v. Britton* followed. This decision has been both lauded as marking "the first time that the United States Supreme Court has treated and applied qualified immunity in a realistic litigation fashion," M. Schwartz, *Section 1983 Litigation – Supreme Court Developments, Symposium: The Supreme Court and State and Local Government Law – the 1997-98 Term*, 15 TOURO L.REV. 859, 877 (1999), and criticized as failing to "directly address the more complex question of how the *Harlow* test for qualified immunity should be applied once inquiry into

the defendant's subjective intent is permitted." L. Eskow & K. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the "Specter of Subjective Intent that Haunts Objective Legal Reasonableness"*, 50 BAYLOR L.REV. 869, 871 (1998).

While the Court in *Crawford-El* recognized the problems of applying *Harlow*'s "objective reasonableness" test in motive-based constitutional tort cases, and the need to make factual determinations as to why an official acted as he or she did, it did not resolve who should make that determination, when it should be made, or how. The writ of certiorari should be granted to resolve these questions.

## II. The Decision of the Court Below Violates the Limitations of An Interlocutory Appeal Under the Collateral Order Doctrine

Without regard to whether there is a conflict in the circuits, another problem with the Fifth Circuit's opinion is that the court ignored the boundaries of the collateral order doctrine. Because of the possibility for countless appeals from every decision by the trial court, the collateral order doctrine allows appeals of "nonfinal" orders in only a very few situations. A central requirement is that the matter presented on appeal be separable from the merits of the case in chief. The Fifth Circuit totally ignored this limitation on its jurisdiction, and made factual, and thereafter legal, determinations that went straight to the heart of the merits of Lukan's case.

The reason for this error, Petitioner submits, is that there are two approaches to the question of entitlement to qualified immunity: one is based primarily on the Fourth

Amendment under which the plaintiff generally does not need to prove an unlawful motive on the part of the official; and the other is for motive-based constitutional torts that typically arise under the First or Fourteenth Amendments. *Compare County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (whether the police officer's highspeed chase of a motorcycle when the driver refused to halt, which chase resulted in a passenger's death, violated clearly established law) with *Crawford-El* (whether a prison official's desire to retaliate against a prisoner for his First Amendment speech to which she took exception is what motivated her decision to delay his receipt of legal papers).

The decision on qualified immunity in *County of Sacramento* could be made on interlocutory appeal because the actor's subjective intent was irrelevant and the appeal turned, not on the facts, but rather on whether a reasonable officer in the defendant's shoes would have known that it was a violation of the passenger's rights to chase the motorcycle. In *Crawford-El*, on the other hand, the determination of qualified immunity would turn on why the defendant acted as she did – was it because she had a personal dislike of the prisoner in general, or was it because she wanted to get back at him for tricking her into allowing him to speak with a newspaper reporter? One approach is used when subjective intent is irrelevant and the other when it is an issue in the plaintiff's case.

The error by the court below was to apply both approaches in their entirety to this case. It stated a two-step analysis of whether an official is entitled to qualified immunity. First was the standard test: if the official's

conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. (App. 6). It then added a second prong to the test: "even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable." (*Id.*). The addition of this second prong was, Petitioner contends, erroneous.

Even when applying the first prong, though, the Fifth Circuit erred by weighing the evidence and making fact determinations as to motivation. The court began by stating the evidence in favor of Lukan's claim of unlawful motive:

> Lukan presented evidence of retaliation by Scott, asserting that Scott removed tax and purchasing responsibilities from his control and that she also recommended not renewing Lukan's employment contract. Lukan also suggested that Scott had a motive to retaliate against Lukan because his speech led to Scott's temporary suspension and termination. Further, Lukan contends that as the head of the hiring committee, Scott had the opportunity to make negative comments and direct the interviewing committee to select candidates other than Lukan for the chief financial officer and internal auditor positions.

(App. 7-8). Despite this evidence and the logical inferences therefrom, the court nonetheless concluded that Lukan had failed to prove that an unlawful motive led

Respondents[2] to take adverse employment actions against him. It reached this conclusion based on affidavits presented by not yet deposed committee members who denied any knowledge of his protected speech.[3] (*Id.*)

As to the second prong, the court below asserted in the alternative that Respondents would have made the same decisions regardless by attributing the district's "severe financial problems" to Lukan's job performance. (App. 8-9). This decision was not based on undisputed facts, but rather required the court to accept as true all facts asserted by Respondents. This alone is error. More importantly, however, the lower court's rationale would, as the Sixth Circuit observed, "immunize all defendants in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds." *Hoard v. Sizemore, supra*, 1999 U.S. App. LEXIS 29961 at *35.

While the court did not specifically say so, the source of the second prong was this Court's ruling in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), which was neither a qualified immunity case nor one resulting from

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[2] The court below mistakenly concluded that Lukan had dropped his claims against Brisco. (App. 7). Lukan was merely unable to fully contest Brisco's appeal because he had not conducted sufficient discovery before he was required to respond to the motion for summary judgment. Hence, his Rule 56(f) motion.

[3] *Compare Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot.").

an interlocutory appeal. There, the district court found that the teacher's communication to the radio station was protected by the First and Fourteenth Amendments and played a "substantial part" in the board's decision to not renew his contract. This Court observed, however, that that finding alone would not necessarily amount to a constitutional violation justifying remedial action if the board, in fact, would have reached the decision to not renew the contract in any event. 429 U.S. at 285. It held that the burden fell on the school district to prove by a preponderance of the evidence that it would have taken the same action regardless and remanded the matter because it could not ascertain whether the lower courts had applied the proper test.

The court below may have confused the *Mt. Healthy* decision as standing for the proposition that the assessment of the evidence was a question of law. That is not, however, a correct reading of *Mt. Healthy*. *Mt. Healthy*'s remand for the lower court's reconsideration of the facts was not because the resolution was a question of law, but instead because the trial court had also served as the trier of fact. *Mt. Healthy* was a bench trial, not an interlocutory appeal of the denial of qualified immunity.

The court below was therefore in error to rely on *Mt. Healthy* in reaching its decision that it had jurisdiction to decide the weight of the evidence as a question of law.

## III. The Review of An Official's Entitlement to Qualified Immunity Must Yield to the Seventh Amendment's Guarantee to Trial By Jury

The concept of qualified immunity as a defense to liability is one created by the judiciary. While its goal of preventing government officials from having to defend against frivolous claims is of considerable importance, adherence to that doctrine must not be allowed to supplant the guarantee of the Seventh Amendment to the U.S. Constitution.

As was recently observed by Justice Scalia, the historical preference is for judges to resolve legal questions while juries make primarily factual determinations:

> [This] fact-law dichotomy is routinely applied by the lower courts in deciding § 1983 cases. For instance, in cases alleging retaliatory discharge of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech.

*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, ___, 119 S.Ct. 1624, 1649 (1999) (Scalia, J., concurring in part and concurring in the judgment) (citing *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998)).

A suit under 42 U.S.C. § 1983 seeking legal relief is an action at law within the meaning of the Seventh Amendment. 526 U.S. at ___, 119 S.Ct. at 1638. Because claims brought pursuant to § 1983 sound in tort, this Court concluded, an individual seeking redress for an invasion

of his right under federal law must be afforded the same rights as those who seek redress for interference with protected personal or property interests. 526 U.S. at ___, 119 S.Ct. at 1638. This includes the right to have the jury, rather than the judge, determine the question of liability. 526 U.S. at ___, 119 S.Ct. at 1642.

This holding is consistent with other decisions by the Court over the years. If it is a factual dispute, it must be resolved – and it must be resolved by the finder of fact. At the summary judgment stage, after all, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The cold record cannot reveal a witness' discomfort, a telling pause before answering a difficult question, or the posture of the individual on the witness stand when confronted with inconsistent statements. And, few persons accused of violating someone's rights will actually confess to the misdeed. As this Court once observed, "There will seldom be 'eyewitness' testimony as to the employer's mental processes," and therefore employment discrimination need not be proved by direct evidence. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). The importance of circumstantial evidence, which a jury considers, was summed-up in a vivid quote from a well-known trial lawyer on the probative value of circumstantial evidence:

> We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.

*Hopkins v. Andaya*, 958 F.2d 881, 888 (10th Cir. 1992) (quoting Abraham Lincoln).

Writ of certiorari should therefore also be granted because the court below weighed the evidence as to credibility and motive and made a factual determination as to the question of causation. Petitioner respectfully submits that the appellate court was in error and that its action improperly invaded the province of the jury reserved to it by the Seventh Amendment to the U.S. Constitution.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

No. 98-21158

---

OLUFEMI ANTHONY LUKAN,

Plaintiff-Appellee,

VERSUS

NORTH FOREST ISD; et al.,

Defendants,

GLORIA S. SCOTT, L.V. BRISCO,

Defendants-Appellants.

---

Appeal from the United States District Court
for the Southern District of Texas

---

(Filed Jul. 28, 1999)

Before EMILIO M. GARZA, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Olufemi Lukan filed suit against the North Forest Independent School District, Dr. Gloria S. Scott, and L.V. Brisco, alleging a free speech retaliation claim under 42 U.S.C. § 1983 and a state law claim under the Texas Whistleblower Act. The district court denied the Appellants' motion for summary judgment on the ground of qualified immunity. We reverse.

## I. FACTS AND PROCEEDINGS

Lukan was first employed by the North Forest Independent School District ("NFISD") in 1986. Initially, he worked as an accounting supervisor for three years under L.V. Brisco in the district's business office. In 1989, Lukan was promoted to the district's internal auditor position, where he [sic] responsible for informing the superintendent of the district's financial affairs and working with external auditors on audits for the year.

In April, 1996, Dr. Gloria S. Scott succeeded Dr. Carroll Thomas as the NFISD superintendent. In July, 1996, Scott reorganized the entire NFISD administrative office. As a part of the reorganization, Lukan, on Scott's recommendation and the school board's approval, was appointed to the newly created position of director of financial services. At this time, Scott contracted with an independent public accounting firm, Saul & Pechacek, to audit the district's finances.

In August, 1996, Lukan discovered financial improprieties in the business office. Lukan was confronted with requests from Scott and Brisco for payments to a construction company that appeared to circumvent the competitive bidding process. Lukan also found that two laptop computers disappeared from the district that were reported stolen from Brisco's home during a burglary. Brisco's personal insurance paid him for the loss of the computers and he had not yet paid the district for the losses. In addition, Lukan discovered a questionable financial entry showing $7.3 million attributed to a miscellaneous expenditures account. Finally, Lukan noticed that Scott and Brisco had approved questionable wire

transfers of nearly $2.1 million to a third party with little or no documentation. As a result, Lukan reported the suspected financial improprieties to the Texas Education Authority ("TEA") and the Harris County district attorney's office.

The record reflects that the district had a considerable number of financial problems in addition to the suspected improprieties that Lukan discovered. In September, 1996, Scott received the special audit report from Saul & Pechacek which was critical of the district's finances. The report noted that the district's bank accounts had not been reconciled in approximately five years and criticized Lukan's job performance for failing to inform the superintendent of the district's financial situation and failing to conduct audits of the reconciliations. In October, 1996, in response to Lukan's whistleblowing, the TEA sent auditors to the district to investigate the finances. The TEA auditors cited numerous problems with the district's finances and accounting. In March 1997, as a result of the TEA investigation, Scott and Brisco were suspended by the NFISD Board of Trustees, and in April, Scott was terminated. Scott and Brisco were later reinstated when the composition of the board changed as a result of a new board election.

In April, 1997, the TEA again visited the district to evaluate the 1997 fiscal year (September, 1996 – August, 1997) budget. In this evaluation, the TEA recommended external consultants to improve the financial state of the district, and further, stated that the district needed to reorganize the business office. The external consultants also were critical of Lukan's job performance. In June,

1997, upon TEA's recommendation, the district reorganized the business office, creating three new positions, a chief financial officer, an internal auditor, and a director of fixed assets. Lukan applied and interviewed for the chief financial officer position with five other candidates. After evaluating and ranking each of the candidates on a numerical system, Lukan was not selected by a four-member interviewing committee for the chief financial officer position. Because the chief financial officer position encompassed Lukan's old job, the director of financial services, Lukan was reassigned to a position with the same pay as the director of fixed assets position. Lukan also applied for the internal auditor position. The committee again recommended another applicant.

In September, 1997, Lukan filed suit under 42 U.S.C. § 1983 asserting a violation of his First Amendment rights, and further, asserting violations of the Texas Whistleblower Act. *See* Tex. Gov't Code Ann. § 554.002 (Vernon Supp. 1999). Defendants filed motions for summary judgment on the basis of qualified immunity. The district court denied defendants' motions.

## II. DISCUSSION

### A. Appellate Jurisdiction

Before reaching the merits, we must determine whether we have appellate jurisdiction in this interlocutory appeal. The district court denied Appellants' motion for summary judgment on the ground that "several material fact issues" existed. We conclude that the district

court's denial of summary judgment on the basis of qualified immunity was based on a conclusion of law and that we possess jurisdiction to hear this appeal.

"District court orders denying summary judgment on the basis of qualified immunity are immediately appealable under the collateral order doctrine, notwithstanding their interlocutory character, when based on a conclusion of law." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). An order is purely legal where it concerns only the application of established legal principles to a given set of facts. *See Johnson v. Jones*, 515 U.S. 504, 513-14 (1995). The existence of disputed issues of material fact does not necessarily preclude review of the case. *See Wren v. Towe*, 130 F.3d 1154, 1157 (5th Cir. 1997). A petitioner may "claim on appeal that all of the conduct which the District Court deemed sufficiently supported for the purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' " *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996)). *See also Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Appellants claim that they are entitled to qualified immunity as a matter of law because the facts at issue do not constitute a clearly established violation of federal law or, in the alternative, that their actions were objectively reasonable. As we are addressing conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.

B. Standard of Review

This Court reviews the district court's denial of a motion for summary judgment based on qualified immunity *de novo*. *See Benningfield v. City of Houston*, 157 F.3d 369, 374 (5th Cir. 1998). Summary judgment shall be entered in favor of the moving party if the record, taken as a whole, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" where a reasonable party could return a verdict for the nonmoving party. *See Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997). If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

C. Qualified Immunity

The sole issue on interlocutory appeal is whether Appellants were entitled to qualified immunity from Lukan's § 1983 claim for the alleged violation of his First Amendment rights. In determining whether a public official is entitled to qualified immunity under § 1983, we apply a two-step analysis. First, if the official's conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. *See Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir. 1998). Second, even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable. *See id.*

A First Amendment retaliation claim must include facts showing that: (1) the employee suffered an adverse employment decision; (2) the employee's speech involved a matter of public concern; (3) the employee's interest in commenting on matters of public concern outweighs the defendants' interest in promoting efficiency; and (4) the employee's speech must have motivated the defendants' action. *See Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999). If the plaintiff carries this burden, then the defendant must show, by a preponderance of the evidence, that it would have taken the same action against the plaintiff even in the absence of the protected conduct. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-87 (1977); *Brady v. Houston Indep. Sch. Dist.*, 113 F.3d 1419, 1423 (5th Cir. 1997).

At the outset, we note that Lukan has abandoned his First Amendment retaliation claim against Brisco. Lukan has not presented any evidence that Brisco retaliated or conspired against Lukan. With respect to Scott, the parties do not dispute that Lukan suffered an adverse employment decision, the speech involved was a matter of public concern, and the matters of public concern outweighed interests in efficiency. Thus, we consider only whether Lukan's speech motivated Scott's actions.

Lukan's evidence fails to establish a causal connection between the speech and the adverse employment actions that he alleges. Lukan presented evidence of retaliation by Scott, asserting that Scott removed tax and purchasing responsibilities from his control and that she also recommended not renewing Lukan's employment contract. Lukan also suggested that Scott had a motive to retaliate against Lukan because his speech led to Scott's

temporary suspension and termination. Further, Lukan contends that as the head of the hiring committee, Scott had the opportunity to make negative comments and direct the interviewing committee to select candidates other than Lukan for the chief financial officer and internal auditor positions.

Our review of the record, however, shows that the interviewing committee responsible for selecting the job candidates did not retaliate against Lukan. The interviewing committee members testified in affidavits that they did not have any knowledge of Lukan's whistleblowing activities against Scott. Lukan has not alleged, nor can we find, any evidence that the committee's process was tainted or harbored any illegal motives. The interviewing committee ranked Lukan and other candidates for the chief financial officer and internal auditor positions on a numerical-based system using a series of identical questions posed to each candidate. The committee recommended the highest scoring candidates for the chief financial officer and internal auditor positions to the NFISD board. The NFISD, in turn, hired the recommended candidates. Lukan has failed to establish a causal connection between his speech and the alleged retaliatory conduct.

Moreover, our review of the record shows that even if Lukan established that his speech motivated their conduct, the defendants would have taken the same action. The district was suffering from severe financial problems prior to and during Scott's tenure as the superintendent. Multiple audits of the business office showed ongoing performance problems such as failures to conduct bank reconciliations, unrecorded checks and deposits, and

large budget deficits. The September, 1996, special audit report was critical of the business office staff and the failures to reconcile the bank accounts. The October, 1996, TEA evaluation highlighted a number of financial and accounting problems in the district, and further, recommended external auditors and reorganization of the business office. The external auditors found the district's financial records "the worse they had ever seen." In light of Lukan's job performance and the critical state of the district's finances, the Appellants would have taken the same action in the absence of Lukan's protected conduct. Thus, Appellants did not violate Lukan's constitutional rights and were entitled to qualified immunity.

## III. CONCLUSION

Based on the foregoing reasons, the district court's denial of summary judgment for Appellants is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 98-21158

---

OLUFEMI ANTHONY LUKAN

Plaintiff – Appellee

v.

NORTH FOREST ISD; ET AL

Defendants

GLORIA S SCOTT; L V BRISCO

Defendants – Appellants

---

Appeal from the United States District Court
for the Southern District of Texas, Houston

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**ON PETITION FOR REHEARING**

(Filed Sept. 27, 1999)

Before EMILIO M. GARZA, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellee Olufemi Anthony Lukan in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

REHG-2

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Supreme Court, U.S.
FILED
FEB 15 2000

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No. 99-1099

IN THE

# Supreme Court of the United States

OLUFEMI ANTHONY LUKAN,

*Petitioner,*

*v.*

GLORIA SCOTT, Individually and as Superintendent of the North Forest Independent School District and L. V. BRISCO, Individually and as Deputy Superintendent of the North Forest Independent School District,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly decided this case.

II. Whether the decisions of the Courts of Appeals conflict in their interpretation of *Crawford-El v. Britton*, 523 U.S. 574 (1998).

III. Whether the Court should review a constitutional issue arising from an interlocutory order and prior to the rendition of a final judgment.

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## OPINIONS BELOW

The District Court's December 12, 1998, Order denying Respondents' Motion for Summary Judgment asserting the defense of qualified immunity to Petitioner's First Amendment retaliation claim is set out at App. 1a of the Appendix. The July 28, 1999, opinion of the Fifth Circuit in this matter, as well as the September 27, 1999, Order of the Fifth Circuit denying Respondent's Petition for Rehearing, are both set out in the Appendix to Petitioner's Petition For A Writ of Certiorari at App. 1-11.

## STATEMENT OF THE CASE

## SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Fifth Circuit correctly decided this case because Petitioner's summary judgment evidence "fail[ed] to establish a causal connection between the speech and the adverse employment actions that he alleges." *Lukan v. North Forest Indep. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999). The decisions of this Court establish that a necessary concomitant to the threshold immunity question is the determination of whether the plaintiff has asserted the violation of a constitutional right at all. Contrary to Petitioner's assertion, the Fifth Circuit did not impermissibly "weigh the evidence" in reaching this result. Rather, the Fifth Circuit merely followed the procedure set forth by this Court in *Johnson v. Jones*, 515 U.S. 304 (1995), which requires the Court of Appeals to undertake a review of the record in interlocutory qualified immunity appeals where the District Court makes no fact findings as to the reasons for denying a summary judgment motion.

2. There is no conflict in the decisions of the Courts of Appeals. While the Courts of Appeals predictably reach different outcomes based on the specific facts of each case cited by Petitioner, there is no inconsistency in the application of the rule announced in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Petitioner confuses the *Crawford-El* holding concerning the proof requirements in a motive-based constitutional case with the jurisdictional limitations on interlocutory appellate review. However, the Courts of Appeals are not confused, and the holdings in the cases relied upon by Petitioner reflect complete adherence to both the *Crawford-El* and *Johnson* opinions.

3. Similarly, as the Fifth Circuit's decision was based on undisputed facts and addressed only questions of law, Petitioner's third argument in support of certiorari — that he was deprived of his Seventh Amendment guarantee of trial by jury — is equally meritless. *See Johnson*, 515 U.S. at 313-14 (finding that an order is purely legal when it concerns only the application of established legal principles to a given set of facts); *Lukan*, 183 F.3d at 345 ("As we are addressing conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.").

4. The procedural posture of this case suggests that the Petition for Writ of Certiorari should not be granted. Allowing this case to proceed to final disposition below might make it unnecessary for this Court to address constitutional questions at this stage of the litigation.

## PROCEDURAL HISTORY

Petitioner filed suit in September 1997 in state district court against the North Forest Independent School District ("NFISD"), Gloria S. Scott and L. V. Brisco, alleging that he was a victim of certain adverse employment actions brought about by his speech on matters of public concern. Petitioner asserted a free speech retaliation claim under 42 U.S.C. § 1983 and a state law claim under the Texas Whistleblower Act. After removing the case to federal district court, the Defendants filed a motion for summary judgment. Defendants Scott and Brisco asserted the defense of qualified immunity. On December 12, 1998, the District Court denied Defendants' motion, stating only that "there are several material fact issues, which necessitate a trial for their proper resolution." App. at 1a. Scott and Brisco filed their Notice of Appeal on December 18, 1998.

On July 28, 1999, the Fifth Circuit reversed the District Court's Order on the grounds that Petitioner failed to establish a causal connection between his speech and the adverse employment actions of which he complains. The Court of Appeals also found that Scott and Brisco would have taken the same action regardless of Petitioner's speech. Thereafter, the Fifth Circuit denied Petitioner's request for a stay of the mandate, and remanded the case to the District Court.

## FACTS

The pertinent factual background is set forth in the Opinion of the Court of Appeals. However, certain of the undisputed material facts are discussed below to expedite the Court's understanding and disposition of this matter.[1]

Petitioner served as NFISD's Internal Auditor from 1989 until July 1996. In April 1996, Scott became NFISD's Superintendent. As the new Superintendent, Scott commissioned an independent audit of the NFISD finances and reorganized the entire NFISD administrative office in July 1996. As part of that reorganization, Scott appointed Petitioner to the newly created position of Director of Financial Services. In August 1996, Petitioner claims that he reported certain suspected financial improprieties in the NFISD Business Office to the Texas Education Agency ("TEA").

In September 1996, Scott received the independent audit report which was critical of the entire Business Office staff, including Petitioner and Brisco — NFISD's Deputy Superintendent for Administration and Fiscal Planning. The report concluded by recommending that the District conduct an extensive search for a Chief Financial Officer, and that the District reorganize its Business Office.

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1. The "Facts" section of the Petition consists primarily of a recitation of the underlying reasons why Petitioner spoke out on a matter of public concern and how his speech allegedly motivated Scott and Brisco against him. Consideration of these "facts" is unnecessary, as Respondents conceded for purposes of appeal that Petitioner spoke out on a matter of public concern. Further, while the Fifth Circuit recognized that Petitioner "suggested" that Scott had a motive to retaliate against him "because of his speech," the undisputed material facts established conclusively that there was no causal connection between Scott's alleged motive and the adverse employment actions of which he complains.

In October, 1996, the TEA sent a team of auditors to the District to investigate. Although the TEA did not issue a "formal" report at the conclusion of its visit to the District, it did provide Scott with "informal" notes of its findings that stated that the District was in a "worsening fiscal situation."

The TEA once again visited the District in April 1997 to assist it in determining its current budget status. The TEA sent a letter to the District following the visit which cited several financial management issues that the District needed to address, and recommended that NFISD hire financial consultants "as soon as possible" and reorganize its financial management operations. In response, the District hired two school district financial consultants recommended by the TEA — Jerry Keeble and Bill Outlaw. Over the next four months Keeble and Outlaw attempted to correct the multitude of problems in the District's Business Office. Both Keeble and Outlaw thought that the District's financial records were "the worst they had ever seen," and that Petitioner — as Director of Financial Services — was directly responsible for this situation.

The District also followed the TEA's recommendation and reorganized its Business Office in June 1997. As part of that reorganization, the District created a Chief Financial Officer position, reinstated the Internal Auditor position, and created a Director of Fixed Assets position. Petitioner initially applied and interviewed for the Chief Financial Officer position in June 1997 along with five other candidates. Each candidate was interviewed by a four-member committee consisting of Mr. Outlaw, Mr. Roy Ford — NFISD Assistant Superintendent for Human Resources & Staff Development, Elaine Berry Ed.D. — NFISD Associate Superintendent for Curriculum & Instruction, and

Scott. Brisco did not sit on the interview committee or otherwise participate in the interview process. The candidates were numerically ranked by each interview committee member based on a series of identical questions posed to each candidate. Numerical tabulations from the interview committee ranked Petitioner third out of the six candidates for CFO. Scott's individual tabulations also ranked Petitioner third out of the six candidates. Without Scott's scores, Petitioner would have ranked *fourth* out of the six candidates. Mr. Jimmie Young received the highest overall score from the interview committee. Scott recommended to the NFISD Board that Mr. Young be selected as the CFO. Mr. Young was hired by the Board on June 30, 1997.

Since the CFO's responsibilities more than encompassed the Director of Financial Services position, that position was dissolved and Scott reassigned Petitioner to the position of Director of Fixed Assets — a position with the same compensation and rank (Director) as Director of Financial Services, the position he previously held.

Petitioner then applied and interviewed with two other candidates for the Internal Auditor position in August 1997. Scott gave Petitioner the highest score out of the five[2] interview committee members. However, Petitioner received the lowest total score from the interview committee. Scott

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2. Mr. Keeble had to leave the CFO interview process prematurely in order to attend a funeral. Therefore, his scores were not used in the final recommendation process for CFO, and the "interview committee" consisted of only four individuals. Mr. Keeble was able to participate in the entire recommendation process for Internal Auditor, and therefore the "interview committee" consisted of five individuals.

once again recommended the highest-ranking candidate to the NFISD Board, and Mr. Melvin Waits was hired by the Board as the new Internal Auditor in August 1997.

The only member of the interview committee accused by Petitioner of retaliating against him is Scott. None of the other members of the committee are alleged to have retaliated against Petitioner, or to have even known that Petitioner was making complaints to TEA. The month after Mr. Waits was hired as the Internal Auditor, Petitioner filed this lawsuit.

## REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that a petition for a writ of certiorari "will be granted only for compelling reasons." One situation that the Court considers compelling is where two or more Courts of Appeals have entered conflicting decisions "on the same important matter." SUP. CT. R. 10(a) (1999). At least one commentator has suggested that a conflict must not only be compelling and important — it must also be "intolerable." ROBERT L. STERN, SUPREME COURT PRACTICE § 4.3 (6th ed. 1985). While the Court has not specifically defined what conflicts it regards as "compelling" and "important," it seems clear that it will only review those cases presenting the most recurring and substantial conflicts on issues of the utmost importance to the general public. As demonstrated below, this case is not worthy of review by this Court.

### I. The Fifth Circuit Correctly Decided This Case.

The Fifth Circuit employed the correct legal analysis to determine that Scott and Brisco were entitled to qualified immunity in this case. First, the Fifth Circuit correctly

observed that if a public official's conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (noting that "the determination of whether the plaintiff has asserted a violation of a constitutional right at all" is a "necessary concomitant" to the threshold immunity question). Second, the Fifth Circuit followed the procedure required by this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995), when a District Court denies summary judgment based on qualified immunity without indicating its reasons for doing so. In such a situation, the Court of Appeals must undertake a review of the record to determine what facts the District Court, in the light most favorable to the non-moving party, likely assumed. Upon reviewing the record, the Fifth Circuit found that the material facts were not in dispute, and that: (1) Petitioner's evidence failed to establish a causal connection between the speech and the adverse employment actions as he alleges; and (2) even if Petitioner established that his speech motivated Scott and Brisco's conduct, they would have taken the same action.

Petitioner erroneously accuses the Fifth Circuit of ignoring the limitations on its jurisdiction by improperly weighing the evidence.[3] However, the Fifth Circuit did not impermissibly weigh the evidence. The Court of Appeals simply noted that the record was devoid of any evidence concerning a material element of Petitioner's underlying constitutional claim; to wit, causation. The Fifth Circuit essentially assumed that Petitioner had met his burden of raising a fact issue as to Scott's motivation. However, as noted in the opinion, the only "evidence" adduced by Petitioner that the interview committee process was tainted

3. Notably, Petitioner did not raise the jurisdictional issue until he filed his Petition for Rehearing in the Court of Appeals.

was his argument that Scott had the opportunity to make negative comments and direct the interview committee to select other candidates. This is pure speculation and amounts to no evidence at all that the interview committee retaliated against Petitioner. By failing to offer any evidence that the interview committee was improperly influenced by Scott, Petitioner "failed to establish a causal connection between his speech and the alleged retaliatory conduct."

Petitioner's argument that the Fifth Circuit impermissibly weighed the evidence is based upon an apparent misunderstanding of the relationship between this Court's opinions in *Crawford-El, Johnson,* and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). A brief examination of the holdings in these cases discloses that the Fifth Circuit's decision in this case does not conflict with precedent from this Court, and that this case was correctly decided.

In *Crawford-El*, this Court held that when a plaintiff brings a constitutional action against a government official for damages, and the official's improper motive is a necessary element of the claim, the plaintiff is not required to present clear and convincing evidence of improper motive in order to defeat the official's motion for summary judgment. In reaching this conclusion, the Court made several observations which are particularly applicable to the case at bar. First, the Court noted that the qualified immunity test is essentially an objective legal one, and proof of subjective intent is largely irrelevant to its application. Thus, the Court found no support for the Court of Appeals' holding that a heightened standard of pleading or proof should be required to defeat a claim of qualified immunity in a motive-based constitutional case.

Second, while noting that evidence of improper motive is irrelevant on the issue of qualified immunity, *Crawford-El* recognized that it may be an essential component of the plaintiff's affirmative case. However, the Court expressed the view that the heightened pleading/proof standard advocated by the Court of Appeals was unnecessary, because existing law already provides for the summary disposition of insubstantial motive-based constitutional claims:

> Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech), the substantive legal doctrine on which the plaintiff relies may facilitate summary judgment in two different ways. First, there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern). Second, at least with certain types of claims, *proof of an improper motive is not sufficient to establish a constitutional violation -- there must also be evidence of causation.*

*Crawford-El*, 118 S. Ct. at 1594 (emphasis added) (citation omitted).

It is ironic that Petitioner places principle reliance on *Crawford-El*, because he is advocating the adoption of a rule that was expressly rejected by the Court in *Crawford-El* — that proof of motive alone is sufficient to establish a constitutional violation. From the outset, Petitioner has attempted to bootstrap his allegations of motive to satisfy his burden of proving a constitutional violation. Petitioner's argument regarding Brisco serves to underscore the absurdity

of the result he proposes. Petitioner presented absolutely no evidence that Brisco had anything to do with the process of selecting the CFO or Internal Auditor candidates. Yet Petitioner continues to insist that he is entitled to proceed to trial against Brisco because he raised a fact issue as to Brisco's motive. This result is not mandated by the holding in *Crawford-El.*

In *Johnson v. Jones*, this Court rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. The Court concluded that a defendant, entitled to invoke a qualified immunity defense, may not appeal a District Court's summary judgment order "insofar as that order determines whether or not the pre-trial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. However, as in the case at bar, when a District Court denies summary judgment based on qualified immunity without indicating its reasons for doing so, this Court acknowledged that "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Id.* at 319.

Although the principle basis of the Fifth Circuit's opinion in this case is Petitioner's failure to establish the causation element of his claim, the alternative holding is based upon the rule established in *Mt. Healthy* concerning the elements of a First Amendment retaliation claim. Under the rule announced in *Mt. Healthy*, if a plaintiff carries his burden of establishing that he suffered an adverse employment decision because of his protected speech, the defendant may still prevail by showing that it would have taken the same action against the plaintiff even in the absence

of the protected conduct. *See Mt. Healthy*, 429 U.S. at 283-87. Petitioner accuses the Fifth Circuit of erroneously relying on *Mt. Healthy* to create a new "second prong" to the qualified immunity test.[4] In reality, the Fifth Circuit's reliance on *Mt. Healthy* is related to the threshold requirement that Petitioner establish a violation of his constitutional rights. It is undisputed that the school district in this case was in dire financial straits, that it received two independent recommendations to reorganize its Business Office, and that the interview committee which was established to select the candidates was unbiased. Based on these undisputed facts, the Fifth Circuit was able to conclude, under *Mt. Healthy*, that the same actions would have been taken regardless of Petitioner's protected speech.

It is apparent from the above that the Fifth Circuit's opinion in this case precisely conforms to the rules set forth in the opinions of this Court. The District Court denied summary judgment without indicating its reasons for doing so. Thus, the Fifth Circuit had to undertake a review of the record as required by *Johnson*. That review disclosed that the undisputed material facts in the record negated any inference that Petitioner's First Amendment rights were violated because: (1) there was no evidence in the record of a causal connection between his speech and the alleged

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4. Petitioner boldly asserts that the Fifth Circuit "added" a new prong to the qualified immunity test which asks whether the public official's conduct was "objectively reasonable." In fact, the objective reasonableness inquiry has been a part of the qualified immunity test since this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified immunity shields government officials from individual liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

adverse employment actions; and (2) the undisputed evidence established that Scott and Brisco would have taken the same action regardless of Petitioner's speech. *Lukan*, 183 F.3d at 346-47.

By confining its decision to the undisputed material facts contained in the summary judgment record, the Fifth Circuit followed the mandate set forth by this Court in *Johnson*. Thus, Petitioner's second argument in support of certiorari —that the Fifth Circuit's decision violated the collateral order doctrine — is meritless because the rule announced in *Johnson* was based largely on this Court's analysis of the collateral order doctrine as it relates to qualified immunity appeals. As the Fifth Circuit merely applied procedures specifically authorized by *Johnson*, its decision did not violate the collateral order doctrine.

## II. There Is No Conflict For The Court To Resolve.

Petitioner's primary basis for invoking the Court's jurisdiction is an alleged conflict among the Courts of Appeals in the interpretation of this Court's decision in *Crawford-El*. Specifically, Petitioner cites six cases — including the case at bar — that purportedly show a conflict "as to how [the Courts of Appeals] should regard factual disputes as to an official's intent in motive-based constitutional tort cases when the trial court denies qualified immunity and an interlocutory appeal is taken."

The Petition should be denied because there is no conflict among the Courts of Appeals in their interpretation of *Crawford-El*. In fact, four of the six cases identified by Petitioner, including *Lukan*, do not cite, interpret, or otherwise rely upon this Court's opinion in *Crawford-El* —

much less "diverge" in their interpretation of that case. *See Guilloty-Perez v. Fuentes-Agostini*, 196 F.3d 293 (1st Cir. 1999); *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999) (citing only the Court of Appeals' decision in *Crawford-El* on other grounds); *Lukan v. North Forest Indep. Sch. Dist.*, 183 F.3d 342 (5th Cir. 1999); *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736 (10th Cir. 1999).[5] These cases merely apply correctly stated rules of law to their respective situations and predictably reach different outcomes based on the specific procedural posture and facts of each case. *See Guilloty-Perez*, 196 F.3d at 294 (declining jurisdiction on interlocutory appeal from the denial of qualified immunity where district court made specific finding that material fact issues existed concerning defendants' actions and motivations); *Davidson*, 193 F.3d at 150 (citing *Johnson* and declining review of "evidence sufficiency" issues on interlocutory appeal from the denial of qualified immunity where district court made specific findings regarding material fact issues concerning defendants' retaliatory motives); *Butler*, 172 F.3d at 746-47 (affirming district court's granting of qualified immunity where plaintiff failed to establish that his speech was a motivating factor behind the alleged retaliatory action).

The two remaining cases referenced by Petitioner cite *Crawford-El*, but they do not conflict. *Brown v. Cochran*, 171 F.3d 1329 (11th Cir. 1999) involved a race discrimination claim wherein the district court denied qualified immunity and the public official brought an

5. The Tenth Circuit's decision in *Butler* also does not support Petitioner's claimed conflict because it does not involve the denial of qualified immunity and subsequent interlocutory appeal, but rather the grant of qualified immunity and appeal after the complete disposition of plaintiff's case. *See Butler*, 172 F.3d at 743-45.

interlocutory appeal. The Eleventh Circuit cited *Crawford-El* for the general proposition that a plaintiff must identify affirmative evidence from which a jury could find improper motive in order to defeat summary judgment. *Id.* at 1332-33. After analyzing the record, the court found that the plaintiff had failed to establish a constitutional violation in the first instance because the undisputed material facts failed to prove the requisite motive element of the plaintiff's claim. *Id.* at 1333.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), nineteen former county employees brought a free speech retaliation claim against several defendants on the grounds that the newly-elected county Judge-Executive did not renominate them for employment in retaliation for their failure to support his campaign. Defendant Sizemore moved for summary judgment based on qualified immunity, and the district court denied his motion on the grounds that "there is still a question of whether the positions . . . were imbued with the discretionary and/or confidential access to the Judge-Executive so as to warrant a reasonable belief that the exception [to the rule that employees cannot be fired on the basis of political affiliation] was applicable." *Id.* at 211.

On interlocutory appeal, the Sixth Circuit cited *Johnson* and found that the undisputed material facts showed that four plaintiffs failed to state a First Amendment political patronage claim in the first instance. *Id.* at 211-16. However, the court declined to extend jurisdiction over the remaining fifteen plaintiffs because the District Court made a specific determination that a genuine issue of material fact existed as to Sizemore's motivations for discharging them. *Id.* at 220. Sizemore argued that his conduct was objectively reasonable, and he should therefore be entitled to qualified

immunity. *Id.* at 217. Citing *Crawford-El*, the court rejected that argument on the grounds that it was merely an attempt to "transform the factual issue of motivation into the legal question of objective reasonableness." *Id.* at 218.

*Hoard* is distinguishable from *Lukan*, but entirely consistent with the Court's decisions in *Johnson* and *Crawford-El*. Contrary to *Hoard*, the District Court in *Lukan* did not indicate its reasons for denying Scott and Brisco's qualified immunity. Therefore, the Fifth Circuit was free to review the record on appeal and determine that the undisputed material facts did not show a constitutional violation irrespective of Scott and Brisco's motivations. Furthermore, the issue of motive in *Hoard* centered upon an individual judge, while the motives of Scott and Brisco were not material to the Fifth Circuit's analysis because there is absolutely no evidence that Scott or Brisco exerted any influence over the interview committee's decisions. Therefore, *Hoard* also does not contribute to any alleged conflict in the Courts of Appeals.

Supreme Court Rule 10 states that a petition for a writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Not only did the cases cited by Petitioner correctly state the applicable rules of law — they correctly applied them. There is no conflict in the Court of Appeals in their interpretation of *Crawford-El*, and the Petition for Writ of Certiorari should therefore be denied.

## III. The Fifth Circuit Only Addressed Questions Of Law.

Petitioner also argues that the Fifth Circuit's adherence to the qualified immunity doctrine "supplanted" his Seventh Amendment right to a trial by jury because the Fifth Circuit made a determination as to causation. Petitioner's argument is meritless because the Fifth Circuit only addressed questions of law.

The Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v. United States*, 319 U.S. 372, 392 (1943). At the core of these fundamental elements is the right to have a "jury *ultimately* determine the issues of fact if they cannot be settled by the parties or determined as a matter of law." *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1178 (5th Cir. 1979) (emphasis in original) (citing *In re Peterson*, 253 U.S. 300 (1920)).

In the case at bar, Petitioner was not deprived of his Seventh Amendment right to a trial by jury because the Fifth Circuit determined only questions of law. *Johnson* held that a Court of Appeals on interlocutory appeal from the denial of qualified immunity may address the purely legal question of whether a given set of facts violates clearly established law. *Johnson*, 515 U.S. at 313-14. In order to show a violation of clearly established law, Petitioner had to first provide some evidence of each element of his First Amendment claim. *See Siegert*, 500 U.S. at 232. After reviewing the undisputed facts in the record, the Fifth Circuit found that Petitioner had no evidence of causation, and therefore failed to show a violation of his constitutional rights. *Lukan*, 183 F.3d at 346. Petitioner's Seventh Amendment right to a jury trial was

therefore not "supplanted." *Id.* at 345 ("As we are addressing only conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.").

## IV. The Lack Of Finality In The Judgment Below Warrants A Denial Of Certiorari.

The Petition for Writ of Certiorari should also be denied because a final judgment has not been rendered in this case. This Court has previously stated that it will not ordinarily issue a writ of certiorari to review a decision of the Courts of Appeals on appeal from an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). One Supreme Court justice has even stated that it is the "normal practice" of the Court to deny interlocutory review. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

There is no "extraordinary inconvenience" that would be suffered by Petitioner based on the Fifth Circuit's granting of qualified immunity to Scott and Brisco because Petitioner still has a free speech retaliation claim pending against NFISD. Therefore, the Court's review of the Fifth Circuit's decision in *Lukan* may not affect the ultimate outcome of this case. As former Justice Brennan once wrote:

> [W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question. . . . Surely we should discipline

> ourselves to be more faithful to the *Ashwander* principle not to address constitutional issues if there is a way to properly avoid doing so.

JUSTICE BRENNAN, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

## CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED DECEMBER 12, 1998**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 97 3306

OLUFEMI ANTHONY LUKAN,

Plaintiff,

vs.

NORTH FOREST I.S.D.
GLORIA SCOTT, AND
L. V. BRISCO

Defendant.

**ORDER**

Before the Court is the plaintiff's complaint, the defendants' motion for summary judgment, and the parties respective responses. After a careful and thorough review of the parties submissions and the applicable law, the Court denies the defendant's motion for summary judgment because there are several material fact issues, which necessitate a trial for their proper resolution.

Signed this 12th day of December, 1998.

/s/ *Kenneth M. Hoyt*
KENNETH M. HOYT
United States District Judge